



**Federal Communications Commission  
Washington, D.C. 20554**

**August 27, 2020**

*In Reply Refer to:*  
1800B3-SS

Bustos Media Holdings, LLC  
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Friends of Portland Community Radio  
c/o Mr. David Kyle  
235 SW 140 Ave.  
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In re: **NEW(FX), Portland, OR**  
Facility ID No. 201227  
File No. BNPFT-20171212AAB

**Petition for Reconsideration**

Dear Counsel:

This letter concerns: (1) the referenced application (Application) of Bustos Media Holdings, LLC (Bustos) for a construction permit for a new FM translator station on Channel 268 at Portland, Oregon (Translator Station);<sup>1</sup> (2) a Petition for Reconsideration (Petition) filed on January 2, 2019, by Bustos, seeking reconsideration of the staff's December 4, 2018, dismissal of the Application; and (3) related responsive pleadings.<sup>2</sup> For the reasons set forth below, we grant the Petition to the extent indicated and deny it in all other respects.

**Background.** Bustos filed a "short-form" application for the Translator Station during the Auction 99 filing window in July 2017.<sup>3</sup> Bustos's proposal was determined to be a "singleton," and it was invited to file a "long-form" application (*i.e.*, Application),<sup>4</sup> which it did on December 12, 2017. The

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<sup>1</sup> The Application proposes fill-in service for Station KRYN(AM), Gresham, Oregon.

<sup>2</sup> On January 8, 2018, Friends of Portland Community Radio (FPCR) filed an Opposition to Petition for Reconsideration (Opposition), to which Bustos replied (Reply) on February 7, 2019. On February 14, 2019, FPCR filed a Motion to Strike the Petition. On April 23, 2019, FPCR filed a Supplement to its Opposition (Supplement), to which Bustos, on May 8, 2019, filed an Opposition to Supplement and Motion to Strike the Supplement. FPCR describes itself as a "public interest nonprofit" organization. *See* Motion to Strike the Petition at 1. We dismiss FPCR's Supplement and Motion to Strike the Petition and Bustos's Opposition to Supplement and Motion to Strike the Supplement as unauthorized pleadings pursuant to 47 CFR § 1.45(c).

<sup>3</sup> *See* Application File No. BNPFT-20170731AJK; *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26-August 2, 2017*, Public Notice, 32 FCC Rcd 4663 (MB/WTB 2017).

<sup>4</sup> *See Media Bureau Announces Filing Window for Long-Form Applications*, Public Notice, 32 FCC Rcd 9248, 9265 (MB 2017).

staff initially accepted the Application for filing on January 26, 2018.<sup>5</sup> Bustos filed an amendment to the Application on March 14, 2018, proposing a revised antenna pattern.<sup>6</sup> FPCR filed an informal objection (FPCR Objection) to the Application on November 4, 2018, alleging that the Translator Station would interfere with the established listening audience of low power FM (LPFM) station KXYQ-LP, in violation of section 74.1204(f) of the FCC's rules (Rules).<sup>7</sup> On December 4, 2018, the staff granted the FPCR Objection and dismissed both Bustos's short-form application and the Application.<sup>8</sup> On January 2, 2019, Bustos filed the Petition.

In its Petition, Bustos argues that the FPCR Objection constituted an illegal *ex parte* contact because FPCR failed to serve Bustos with the pleading. Bustos contends this deprived it of adequate notice and a right to be heard, in violation of Commission and federal circuit court case precedent.<sup>9</sup> Next, Bustos asserts that KXYQ-LP relocated its transmitter site twice and its technical facilities three times after Bustos filed the Application.<sup>10</sup> Bustos claims that under the Commission's "newcomer policy" KXYQ-LP should be protecting the Translator Station from interference rather than *vice versa*.<sup>11</sup> Bustos argues that, after it filed the Application, KXYQ-LP's modification applications "moved its coverage into the Translator Station's protected contour"<sup>12</sup> and that KXYQ-LP is now short-spaced to the Translator

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<sup>5</sup> See *Broadcast Actions*, Public Notice, Report No. 29163 (rel. Jan. 31, 2018). Subsequently, in response to a Petition to Deny the Application filed by Joel Christerson (Christerson), the staff found that Bustos had not complied with the local notice requirements of 47 CFR § 73.3580 and indicated that it would "withhold action on the Application for a minimum of **40 days** after [Bustos] provides evidence of its compliance with Section 73.3580 of the Rules." *Letter to Mr. Joel Christerson and Dennis J. Kelly, Esq.*, (MB rel. Sep. 11, 2018), p.5 (emphasis in original). Bustos amended the Application to demonstrate compliance with section 73.3580 on September 19, 2018).

<sup>6</sup> See *Broadcast Applications*, Public Notice, Report No. 29195 (rel. Mar. 19, 2018).

<sup>7</sup> 47 CFR § 74.1204(f).

<sup>8</sup> See *Letter to Friends of Portland Community Radio, Bustos Media Holdings, LLC, and Dylan Berichon*, Ref. 180B3-SS (MB rel. Dec. 4, 2018) (*Letter Decision*); see also *Broadcast Actions*, Public Notice, Report No. 49378 (rel. Dec. 7, 2018).

<sup>9</sup> Petition at 2-3. In addition, Dylan Berichon, William Schmidt (Schmidt), Michelle Bolin (Bolin), Derric Crooks (Crooks), Kimberley Goddard (Goddard), and Scott Seckington (Seckington), filed separate "informal objections" to the Application which are, in fact, listener complaints against the proposed FM translator. Bustos alleges that all of these filings were improper *ex parte* filings which should have been referred to the Commission's Office of the General Counsel. See *id.* at 3 and at Exhibit C.

<sup>10</sup> *Id.* at 4-5. When Bustos filed the Application on December 12, 2017, KXYQ-LP had yet to be licensed, although it had filed a covering license application, BLL-20170821ABE, on August 21, 2017. The staff granted that application on February 6, 2018.

<sup>11</sup> *Id.* at 4-7, citing *Western Cities Broadcasting, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 6177 (1990) and *Midnight Sun Broadcasting Co.*, Memorandum Opinion and Order, 11 FCC 1119 (1947) (*Midnight Sun*). See also "Declaration of [Bustos Technical Consultant] Kevin J. Youngers." *Id.* at Exh. B. Finally, Bustos advances a number of innuendo-laden arguments about the motivation of KXYQ-LP's technical consultant Todd Urick (Urick) and claims Urick has an impermissible attributable interest in as many as 12 Portland LPFM stations. Bustos asks the Commission to investigate Urick's interests for any violations of 47 CFR § 73.860(b), which limits individuals to attributable interests in one LPFM station and no more than two FM translator stations. See *id.* at 7-8. Bustos also argues that four listener declarations included in FPCR's Objection "suspiciously have the same format" as those previously submitted by Christerson. *Id.* at 7. These unsupported allegations are irrelevant to this matter and will receive no further consideration here.

<sup>12</sup> *Id.* at 6. Bustos indicates that these technical modifications to KXYQ-LP's facilities resulted in the "incoming overlap" from KYQQ-LP doubling from 5.6 km to 11.0 km and caused the Translator Station to go from clearing KXYQ-LP's relevant contour by 0.1 km to an overlap of 4.9 km. Declaration of Kevin Youngers at ¶ 7.

Station. Thus, Bustos appears to argue that any interference KXYQ-LP's listeners receive within the Translator Station's contour are the result of KXYQ-LP's move closer to the Translator Station and that KXYQ-FM is obligated to protect the Translator Station. Bustos requests that the Commission grant reconsideration, dismiss the FPCR Objection, and grant the Application.<sup>13</sup>

In its Opposition, FPCR argues that: (1) no certificate of service is required when filing an informal objection; (2) the FPCR Objection is publicly available in the FCC's CDBS database, and it was published in the FCC's Broadcast Applications *Public Notice*;<sup>14</sup> (3) the *ex parte* cases Bustos cites in the Petition are inapposite to this proceeding;<sup>15</sup> (4) the transmitter relocations coverage changes KXYQ-LP made are not pertinent to Bustos's responsibility to protect the reception of KXYQ-LP's regularly received off-the-air existing service from interference, even if there is no predicted overlap, pursuant to section 74.1204(f) of the Rules;<sup>16</sup> (5) KXYQ-LP is not governed by section 74.1204, as it is fully spaced under section 73.807 of the Rules applicable to LPFM stations;<sup>17</sup> and (6) Urick is a technical consultant for many LPFM stations and that Bustos has provided no evidence that Urick has had any further level of involvement in this proceeding.<sup>18</sup>

In its Reply, Bustos reiterates its claim that the FPCR Objection is an *ex parte* filing. Next, Bustos argues that FPCR's Opposition is procedurally defective because it is 20 pages long and is in violation of the requirements in section 1.49 of the Rules pertaining to pleadings exceeding 10 pages. Finally, Bustos claims that even though FPCR's "standing" in this proceeding is unclear, any affected listeners of KXYQ-LP will have a remedy in section 74.1203 of the Rules if Bustos is allowed to construct the proposed station.<sup>19</sup>

**Discussion.** The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises new facts or changed

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<sup>13</sup> *Id.* at 7, 8.

<sup>14</sup> See Opposition at 4-5; see also *Broadcast Applications*, Public Notice, Report No. 29359 (MB rel. Nov. 8, 2018).

<sup>15</sup> See *Marnie K. Sarver, Esq.*, Letter Order, 28 FCC Rcd 1009 (MB 2013).

<sup>16</sup> 47 CFR § 74.1204(f). FPCR submits numerous technical showings alleging that Youngers' engineering study misconstrues FCC engineering rules regarding KXYQ-LP's obligation to protect the Translator Station from interference. FPCR states that: (1) Bustos originally proposed locating the Translator Station within KXYQ-LP's 40 dBμ interference contour and thus Bustos accepted any resultant interference from KXYQ-LP; and (2) the current interference overlap between KXYQ-LP and the Translator Station is greater than it should be because Bustos erred in depicting its antenna rotation, actually "flipping" it 200 degrees. FPCR argues that the Translator Station's contour pattern does not comport with the standards in 47 CFR § 74.1204 and that the staff never scrutinized the Application's engineering for final grant because it dismissed the Application. See Opposition at 6-18.

FPCR also argues that Bustos is "trafficking" its proposed facility in violation of section 309(j)(4)(E) of the Communications Act of 1934, as amended, because Bustos has already assigned its primary station KRYN(AM) to Centro Familiar Cristiano (Centro) and that -- if the Application is reinstated -- Bustos will immediately assign the Translator Station to Centro. FPCR submits that Bustos has already requested two extensions of consummation. See Opposition at 19. We need not address this allegation here.

<sup>17</sup> Opposition at 8.

<sup>18</sup> *Id.* at 1-20.

<sup>19</sup> Reply at 1-5; see also 47 CFR § 74.1203.

circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>20</sup> Bustos has not met this burden.

*Procedural Issue.* Pursuant to section 1.1208 of the Rules,<sup>21</sup> our consideration of the Application is a restricted proceeding in which *ex parte* presentations are prohibited. Here, the informal objections filed in this proceeding appear to be impermissible *ex parte* presentations as none of the objections indicate that they were served on Bustos or its counsel. In these circumstances, we normally would notify the objecting parties of this issue, remind them of their obligations to serve any future correspondence with the Commission on the applicant, and inform them that we have forwarded copies of their objections to the applicant. In this instance, however, the staff did not forward copies of the FPCR Objection and the other self-styled “informal objections” to Bustos, although the staff made copies of each objection publicly available in CDBS and published notice of each objection in the Broadcast Applications *Public Notice*. Nevertheless, because we agree with Bustos that it should have been served with the objections, we will grant the Petition to the extent that we will consider Bustos’s substantive arguments.<sup>22</sup>

*Substantive Issues.* Initially, we find Bustos’s argument that it is KXYQ-LP’s responsibility to protect Bustos’s proposed FM translator station from interference is misguided because, as observed by FPCR and confirmed by the staff, KXYQ-LP complies with section 73.807 with respect to the Application and because Bustos initially proposed to locate the Application within KXYQ-LP’s 40 dBμ interfering contour.<sup>23</sup> Moreover, any modifications to KXYQ-LP’s technical facilities after the filing of the Application amounted to relatively minor changes in the Translator Station’s service contours and almost no change in its radiation pattern. In addition, KXYQ-LP is not required to protect the Translator Station under the “newcomer policy.”<sup>24</sup> Further, we reject Bustos’s invocation of the *Midnight Sun* “first

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<sup>20</sup> 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

<sup>21</sup> 47 CFR § 1.1208.

<sup>22</sup> Thus, Bustos has the opportunity here to address the interference claims made in the FPCR Objection and the other “self-styled” objections. Also, we will admonish FPCR and the other objectors for their lack of service, in violation of section 1.47(d) of the Rules, and heed them to avoid any such situations in the future. *See* 47 CFR § 1.47(d).

<sup>23</sup> We note that, in the LPFM context, protection of co- and first-adjacent channel stations is achieved by compliance with section 73.807 spacing requirements, while in the FM translator context, it is achieved via compliance with section 74.1204 contour overlap prohibition. Thus, any parallels drawn between the interference regimes applicable to LPFM stations and FM translators are relevant only in the context of second-adjacent channel interference and, even then, only if an LPFM applicant is seeking a second-adjacent waiver. *See, e.g., Razorcake/Gorky Press, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 2697, 2700 n.25 (2017). Here, adhering to the interference contour requirements of section 74.1204, Bustos accepted incoming interference by short spacing with KXYQ-LP in its original proposal for the Translator Station. As FPCR maintains, and as the staff confirms, it is therefore unclear how Bustos can contest incoming interference that existed prior to its proposal. *See* Opposition at 10.

<sup>24</sup> Under the Commission's long-standing “newcomer” policy, a “newcomer” is responsible, financially and otherwise, for correcting all the interference caused to facilities operating at the site prior to the newcomer’s arrival. This policy dates back to *Midnight Sun*, in which the Commission held a broadcaster responsible for resolving interference caused by its new facilities to other preexisting facilities in close proximity. *See Midnight Sun*, 11 FCC at 1119. *See also Sudbrink Broadcasting of Georgia*, Memorandum Opinion and Order 65 FCC 2d 691, 692, para. 5 (1977); *Jesse Willard Shirley*, Memorandum Opinion and Order, 36 FCC 2d 127, 129, para. 7 (1972); *Western Slope Communications, Ltd.*, Mimeo No. 4431 (MB rel. May 31, 1983); *Jack Straw Memorial Foundation*, memorandum Opinion and Order, 35 FCC 2d 397,401, para. 11 *recon. denied* 37 FCC 2d 544, 546, para. 7 (1972); and *Broadcast Corp. of Georgia (WVEU-TV)*, Memorandum Opinion and Order, 96 FCC 2d 901 , 905, para. 9 (1984).

in time” policy in this proceeding.<sup>25</sup> The Commission has opined that “this ‘first in time’ doctrine is generally inapplicable in situations involving translator stations due to the secondary nature of translator service.”<sup>26</sup> Although LPFM stations are themselves secondary services, section 74.1204(f) is very clear: The Commission will not accept an FM translator application “if the predicted 1 mV/m field strength contour of the FM translator station will overlap a populated area already receiving a regularly used, off-the-air signal of any authorized co-channel, first, second, or third adjacent channel broadcast station, including Class D (secondary) noncommercial educational FM stations and grant of the authorization will result in interference to the reception of such signal.”<sup>27</sup> No “first in time” criterion is factored into the analysis, and on the facts of this case we cannot find that the October 2018 complainants will receive interference only as the result of KXYQ-LP’s moving closer to the site proposed in the Application after the Application had been filed. As noted above, KXYQ-LP has been operating with essentially the same coverage contour since it was initially licensed. Thus, the staff appropriately evaluated FPCR’s Objection under section 74.1204(f).

Substantively, in applying section 74.1204(f), the staff found in the *Letter Decision* that at least six listener complainants followed the required protocol by submitting documentation certifying that they are regular listeners of KXYQ-LP at home, at work, or in their cars.<sup>28</sup> By plotting the complainants’ specific addresses on a map depicting the Translator Station’s 60 dBμ contour, they demonstrated that their addresses are within the Translator Station’s 60 dBμ contour. The six listener complaints within the Translator Station’s proposed 60 dBμ contour filed in response to Bustos’s long-form application were sufficient under section 74.1204(f) and Commission precedent to establish predicted interference,<sup>29</sup> and declarations under penalty of perjury from listeners at a specific address or in a car are sufficient for section 74.1204(f) purposes.<sup>30</sup> We affirm the *Letter Decision*’s finding that at least six listeners of KXYQ-LP adequately substantiated their section 74.1204(f) claims.

Because the staff correctly found that these listeners demonstrated their locations inside the 60 dBμ contour of the Translator Station and are predicted to receive interference from the facilities proposed in the amended Application, we affirm the dismissal of the Application and deny Bustos’s Petition with respect to section 74.1204(f) of the Rules.

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<sup>25</sup> See, e.g., *Midnight Sun*, 11 FCC at 1119 (Commission permitted an AM station to place its transmitter at the same site that another AM station had already been authorized to use, but imposed the condition that the former station protect the latter from undesirable interference).

<sup>26</sup> See *960 Radio, Inc.*, Memorandum Opinion and Declaratory Ruling, FCC 85-578, 1985 WL 193883, n.5 (1985) (“first in time” doctrine is generally inapplicable in situations involving translator stations due to the secondary nature of translator service).

<sup>27</sup> We note that, although not relevant to this proceeding given that the staff had already rendered a disposition in this case before revising section 74.1204(f), the Commission recently updated that rule to clarify that that rule’s protections apply to all “regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including previously authorized secondary service stations.” See *Amendment of Part 74 of the Commission’s Rules Regarding FM Translator Interference*, MB Docket No. 18-119, Report and Order, FCC 19-40, at 26, para. 50 (rel. May 9, 2019), modifying 47 CFR §§ 74.1203(a)—(d); 74.1204(f) (emphasis added).

<sup>28</sup> Complainants Seckington, Goddard, Homlstrom, and Janz indicated that their residences are located inside Bustos’s proposed 60 dBμ contour, while Crooks, Kyle, and Holmstrom indicated that they listen to KXYQ-LP in their vehicles on routes inside Bustos’s proposed 60 dBμ contour.

<sup>29</sup> See, e.g., *Red Wolf Broad. Corp.*, Letter Order, 27 FCC Rcd 4870, 4873 (MB 2012) (staff considered three listener complaints sufficient).

<sup>30</sup> See *Frank Jazzo, Esq. and Gregg P Skall, Esq.*, Letter Order, 32 FCC Rcd 5962, 5963 (MB 2017) (statements made under penalty of perjury by “regular listeners” adequately substantiates section 74.1204(f) claim).

**Conclusion/Actions.** For these reasons, IT IS ORDERED, that the Petition filed by Bustos Media Holdings, LLC, on January 2, 2019, IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

IT IS FURTHER ORDERED, that Friends of Portland Community Radio, Dylan Berichon, William Schmidt, Michelle Bolin, Derric Crooks, Kimberley Goddard, and Scott Seckington, ARE ADMONISHED for their violation of 47 CFR § 1.47(d).

Sincerely,

James D. Bradshaw  
Senior Deputy Chief  
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Media Bureau